

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND) MDL NO. 13-02419-FDS
COMPOUNDING)
PHARMACY CASES LITIGATION)
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BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV

STATUS CONFERENCE

John Joseph Moakley United States Courthouse
Courtroom No. 2
One Courthouse Way
Boston, MA 02210

September 12, 2013
1:30 p.m.

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1 PROCEEDINGS

2 THE CLERK: All rise. Thank you. All be
3 seated. Court is now in session. This is the matter of
4 In Re: New England Compounding Pharmacy, Incorporated
5 Products Liability Litigation. This is Case
6 Number 13-md-02419.

7 Counsel for the PSC, please note your
8 appearances for the record.

9 MS. PARKER: Good afternoon, your Honor,
01:32PM 10 Kristen Johnson Parker of Hagens, Berman, Sobol, Shapiro
11 for the plaintiffs' steering committee.

12 THE COURT: Good afternoon.

13 MS. DOUGHERTY: Good afternoon, your Honor,
14 Kim Dougherty, Janet, Jenner & Suggs, also on behalf of
15 the plaintiffs' steering committee.

16 MR. LIPTON: Marc Lipton on behalf of the
17 steering committee, your Honor.

18 MR. CHALOS: Mark Chalos on behalf of the
19 steering committee.

01:33PM 20 MR. FENNELL: Patrick Fennell for the
21 plaintiff's steering committee.

22 MR. MOLTON: Your Honor, David Molton of
23 Brown, Rudnick here with Kiersten Taylor for the
24 official committee of organized creditors, the debtor,
25 NECC.

1 MR. COREN: Michael Coren, co-chair,
2 creditors' committee, your Honor.

3 MR. ELLIS: Rick Ellis, various plaintiffs.

4 MR. GOTTFRIED: Michael Gottfried for the
5 trustee, Paul Moore. With me, my partner, Jeff
6 Sternklar.

7 MR. THOMAS: Joe Thomas on behalf of GDC.

8 THE COURT: Mr. Fern.

9 MR. FERN: Your Honor, Frederick Fern from
01:33PM 10 Harris, Beach, especially-retained counsel for the
11 Chapter 11 trustee.

12 MR. DAILY: William Daily, your Honor, on
13 behalf of the affiliated defendants.

14 MR. RABINOVITZ: Good afternoon, your Honor,
15 Dan Rabinovitz on behalf of Medical Sales Management,
16 Inc.

17 MR. O'HARA: Good afternoon, your Honor,
18 Christopher O'Hara on behalf of Doug Conigliaro and
19 Carla Conigliaro.

01:34PM 20 MR. MORIARTY: Good afternoon, your Honor,
21 Matthew Moriarty for Ameridose.

22 THE COURT: All right. We have various
23 other parties on the phone, some of whom have indicated
24 they wish to be heard at some point in this proceeding.

25 All right. I have the agenda or the

1 proposed agenda, which I will follow as usual.

2 Ms. Parker, why don't you tell me where we are on item
3 Number 1, update on subpoenas and objections.

4 MS. PARKER: Thank you, your Honor. The PSC
5 has served, I believe the number last time I checked was
6 83 subpoenas. A number of those subpoena recipients
7 filed objections in this Court. This Court issued an
8 order addressing some of the substantive issues raised
9 in those subpoena objections and referred the remainder
10 of those objections to Magistrate Boal.

01:34PM

11 THE COURT: Let me stop you there. Are
12 there any that I have not referred because they've come
13 in late?

14 MS. PARKER: I believe that you have
15 referred all of them, your Honor, but we will take
16 another look and let the Court know if that is in fact
17 the case.

18 THE COURT: Okay. Thank you. Go ahead.

19 MS. PARKER: Judge Boal has scheduled a
20 status conference on subpoena objections on
21 September 25th. That date is two days after the
22 deadline for defendants or potential defendants to opt
23 into the mediation program. We think that that timing
24 is fortuitous. We think that there are unfortunately
25 some entities out there who may believe that because of

01:35PM

1 the Court's order and the fact that no additional orders
2 addressing subpoena objections have been issued in that
3 short time period that there may be a misapprehension
4 that the PSC does not intend to pursue aggressively
5 those subpoenas and to address those objections on the
6 merits with Magistrate Judge Boal, so we look forward to
7 addressing all of those issues before her on the 25th.

8 THE COURT: All right. Does anyone else
9 want to be heard on the subject of the subpoenas or the
01:36PM 10 upcoming hearing? All right. Let's go to item 2,
11 status of mediation efforts.

12 MS. PARKER: Discussions with New England
13 Company and the affiliated defendants are ongoing. I
14 won't say anything else one way or the other about that.
15 I don't intend to send any signals. The trustee is
16 actively working through those matters and is apprising
17 the lead counsel and also counsel for the creditors'
18 committee.

19 THE COURT: All right. Does anyone else
01:36PM 20 want to comment on that?

21 MR. COREN: Yes, your Honor, Michael Coren,
22 the co-chair of the creditors' committee. I just wanted
23 to let your Honor know that both the PSC and the
24 official creditors' committee jointly have sent a letter
25 out to all known clinics, healthcare, anyone who would

1 fall within the ambit of the mediation order advising
2 them of your Honor entering the order, supplying them
3 with a copy of the order.

4 We also have set up a question and answer
5 session jointly with the PSC and the creditors'
6 committee for the clinics so if they have any questions
7 regarding, we could answer it. Bankruptcy counsel will
8 be available to answer any bankruptcy-related issues.
9 That is scheduled for the 19th, your Honor. It will be
10 a telephone conference call.

01:37PM

11 As to the plaintiffs, originally I thought
12 it would be the 25th, but I understand it now be the
13 26th now because of the proceedings in front of the
14 magistrate judge that we will have a plaintiff-oriented
15 session to explain to them by then we believe the bar
16 order will be entered and bankruptcy counsel will
17 address the status of that separately, but they'll be a
18 similar question and answer, you know, period regarding
19 the mediation and questions of how that relates to the
20 bar order and those things to get the word out, so if
21 you have any questions I could address regarding that.

01:38PM

22 THE COURT: No, I'm sorry, the thing on the
23 26th is plaintiffs' counsel as opposed to plaintiffs
24 themselves?

25 MR. COREN: Correct. There's a lot of

1 plaintiffs' counsel out there who --

2 THE COURT: That's what I thought, I wanted
3 to make sure I understood it.

4 MR. COREN: Yes.

5 THE COURT: Remind me, what's the present
6 bar date?

7 MR. COREN: It has not yet been set, your
8 Honor. I'll let bankrupt counsel address that for you.

9 THE COURT: All right. Mr. Gottfried.

01:38PM 10 MR. GOTTFRIED: Yes, focusing on your last
11 question first, your Honor, there's a hearing on the bar
12 date motion scheduled for the 23d of this month.

13 THE COURT: I guess that's what I meant,
14 yes.

15 MR. GOTTFRIED: So that's the date of that
16 hearing. Obviously Judge Boroff hasn't decided that
17 yet.

18 THE COURT: Yes.

19 MR. GOTTFRIED: With respect to the
01:39PM 20 discussions between the trustee and the affiliated
21 defendants that the PSC raised in its report, presumably
22 it would echo that the trustee believes that progress is
23 being made, that he has been keeping lead counsel for
24 the PSC, Mr. Sobol, and counsel to the creditors'
25 committee apprised. He's met with both of them several

1 times, including this morning, to apprise him of the
2 status of things, and those discussions are ongoing.

3 THE COURT: All right. And to state what I
4 hope is obvious, no one is under any obligation or
5 pressure to mediate or settle any claim, and to the
6 extent that issues fall within my ambit, as opposed to
7 the transferor courts, I will certainly -- I certainly
8 hope and I expect that I will give any party a fair
9 hearing.

01:39PM

10 Obviously I'm pleased to hear that
11 discussions are underway and hope that they're fruitful,
12 but I also understand that sometimes people can't reach
13 accommodation, and if that's what happens, we're going
14 to go forward with the litigation, and no one will be
15 penalized as a result.

16 All right. Anything else on that topic?
17 All right. Let's go item 3, scheduling issues.
18 Ms. Parker.

01:40PM

19 MS. PARKER: So I think items 3 and 5 are
20 actually duplicative, your Honor, so I'll address both
21 at the same time.

22 THE COURT: Good, because that confused me.

23 MS. PARKER: So earlier today, although not
24 as early as I would have liked, the plaintiffs' steering
25 committee filed a motion for entry of revised case

1 management order.

2 THE COURT: Yes, which I saw and read
3 quickly.

4 MS. PARKER: That case management order
5 really serves three purposes from the plaintiffs'
6 perspective: First, it sets dates for some items that
7 had previously been generally described as occurring at
8 a particular time of year; the second is that it maps
9 out in only broad strokes, your Honor, what the
01:41PM 10 plaintiffs have contemplated in terms of bellwether
11 trials for those cases that in fact proceed to
12 litigation; and the third is it addresses the reality
13 the discovery here has not moved as quickly as I think
14 anyone would have liked.

15 Part of that deals with subpoena objections,
16 which we have already addressed, and part of that deals,
17 we think, with the fact that many entities at play here,
18 defendants or potential defendants, have been spending
19 time considering whether or not to participate in
01:41PM 20 mediation, and the result of that is that some of the
21 discovery has been stalled, so I think as your Honor put
22 it earlier, if you're not mediating, you're moving into
23 litigation, so the schedule contemplates what litigation
24 would look like against entities that do not opt into
25 the mediation program.

1 Now, the schedule that the PSC has provided
2 here is not meant to replace existing CMO-6, which had
3 several other substantive provisions in it, but rather
4 would amend only those dates that are included in the
5 new schedule. We think that's clear, however, if the
6 Court would like a single CMO that contains everything
7 as the operative case management order, we can certainly
8 amend it to do that.

9 In terms of the schedule itself, the
01:42PM 10 plaintiffs' steering committee undertook to reach out to
11 all defendants. That includes NECC, the affiliated
12 defendants, the unaffiliated defendants, and also
13 nondefendants, pain clinics and others who had filed
14 limited notices of appearance in the MDL for the
15 purposes of quashing or objecting to subpoenas, so that
16 is to say, your Honor, we cast a very broad net with
17 this, and we sought input from anyone to speak with us
18 about it.

19 We held a very productive I think meet and
01:42PM 20 confer on the Monday of this week in an effort to put
21 together a joint submission to the Court. We received
22 some comments during that meet and confer, also some
23 e-mail traffic afterwards. The schedule is an effort to
24 accommodate all of the comments that we have received to
25 date. I won't say though that anyone signs off on the

1 schedule.

2 I thought as of this morning that we had an
3 agreement with NECC, I thought until we walked into this
4 courtroom, frankly, that we had an agreement with NECC
5 and the affiliated defendants as to the dates set forth
6 in the schedule and the provisions included in the
7 schedule.

8 I have been informed, and I will, of course,
9 let the affiliated defendants speak to this directly,
01:43PM 10 but I had made a few last minute tweaks to the schedule,
11 meaning I had added a footnote stating plaintiffs'
12 position in an area, and I also had wordsmith things to
13 take out a reference saying "this does not pertain to
14 NECC or the affiliated defendants," in some places to
15 add a single line item, which is item Number 2 saying
16 that certain deadlines do not apply to NECC.

17 I understand that counsel for NECC and the
18 affiliated defendants may have some objections to those
19 changes. I don't understand them to be substantive, and
01:44PM 20 it seems like something that can be resolved between the
21 parties, but I would let them speak to how they wish to
22 proceed.

23 THE COURT: All right. Let me ask some
24 questions. Again, I read this quickly and right before
25 the hearing. As I understand it, what the plaintiffs'

1 steering committee contemplates is that there will be
2 some discovery of plaintiffs "for purposes of
3 determining bellwether cases," that that gets whittled
4 down to six for case specific discovery, presumably
5 finalizing six cases, and that that gets narrowed again
6 to two.

7 Would those be necessarily Massachusetts
8 cases, in other words, without consent, I don't think I
9 have the power to preside over the trial of a case
01:45PM 10 arising in Nashville, Tennessee or Traverse City,
11 Michigan, right? Don't I have to spin those to the
12 districts in which they were filed once pretrial matters
13 are concluded?

14 MS. DOUGHERTY: Your Honor, Kim Dougherty on
15 behalf of the plaintiffs' steering committee. We do
16 anticipate a further case management order that will
17 deal specifically with a bellwether selection and the
18 criteria for that. We're going to negotiate that with
19 the defendants. What we decided to do on the call on
01:45PM 20 Monday was to revisit the specifics of the bellwether
21 criteria and the selection categories and how we reach
22 those, whether they be cases that were directly filed in
23 the MDL or not.

24 We are going to discuss that. I think your
25 initial reaction that cases will be transferred back to

1 the transferor court is exactly right, however, we are
2 going to confer after we know on September 23d who is
3 actually subject to this new order. We're going to
4 confer with those potential defendants and finalize and
5 come up with a bellwether case management order where we
6 set forth the criteria for selection. This is just to
7 earmark deadlines for when that case specific discovery
8 will start, but we will address the issues, particularly
9 those types of questions in another separate CMO for
10 bellwethers.

01:46PM

11 THE COURT: All right. But won't all fact
12 discovery from plaintiffs be case specific, in other
13 words, the plaintiffs haven't acted jointly, right?

14 MS. DOUGHERTY: That's right, your Honor.
15 The way that the schedule is set forth right now will
16 contemplate that the plaintiffs will produce discovery,
17 a plaintiff, either a profile form or some sort of fact
18 sheet that we negotiate with the defendants which will
19 also be some records that will be produced.

01:46PM

20 Usually the way that that's set forth, your
21 Honor, and also will be in another CMO, would be 60 days
22 after the date of filing. The plaintiffs normally will
23 produce a profile form and medical records. What we've
24 set forth here is the cases that are on file that want
25 to be considered for the bellwether selection would have

1 a deadline for producing those plaintiff profile forms
2 and the information that would be necessary to do the
3 selection of those bellwethers.

4 MS. PARKER: Your Honor, if I may, I believe
5 you asked the question of whether cases that were not
6 filed in Massachusetts could be included in the
7 bellwether pool.

8 THE COURT: Without consent.

9 MS. PARKER: Without consent, and the
01:47PM 10 concept is with consent, they could be so that
11 plaintiffs could elect to have their cases tried here,
12 and that is something that has been done certainly in
13 other MDLs.

14 THE COURT: Then fact discovery of
15 unaffiliated defendants and nonparties. Again, I'm just
16 trying to conceptualize all of this. Is that largely
17 physicians, pain clinics and the like? What else would
18 fall in that category?

19 MS. DOUGHERTY: Yes, your Honor, and other
01:48PM 20 potential national defendants such ARL if they aren't
21 inclined to enter the mediation program, other potential
22 defendants such as the installer of the clean room, the
23 designer, other folks who do not opt into the mediation
24 program, so, again, we decided we could revisit some of
25 those issues when we actually know who those potential

1 parties are, but, yes, it would include the clinics and
2 physicians as well.

3 THE COURT: Now, what is the NECC and the
4 affiliated defendants, what is at least the PSC's
5 expectation as to how that discovery is going to play
6 out?

7 MS. PARKER: If it becomes necessary to take
8 formal discovery of NECC and the affiliated defendants,
9 and I don't mean to be suggesting to the Court now that
01:48PM 10 that is the case, if it were necessary, then we would
11 need to revisit that. This case management order does
12 not contemplate that.

13 After having many conversations with the
14 trustee and NECC and the affiliated defendants, the
15 agreement that was struck is between the PSC and the
16 affiliated defendants in this order was that we would
17 agree to extend the stay of discovery against NECC and
18 the affiliated defendant for a month but that we would
19 revisit it at the subsequent status conference, and
01:49PM 20 actually you'll see that photo note 1 in the case
21 management order, which I referred to earlier, indicates
22 that the plaintiffs' steering committee's intention is
23 to move to lift that stay if we are not satisfied with
24 the developments at the time of the October status
25 conference, and in fairness to the affiliated

1 defendants, that footnote was added later on, and, of
2 course, they have not agreed to it.

3 THE COURT: All right. Then explain to me
4 what you mean by common experts as opposed to individual
5 experts. In other words, normally even with a
6 pharmaceutical, I guess this is a form of a
7 pharmaceutical perhaps, but, you know, it has an
8 individualized reaction on a particular patient. I
9 presume each case is going to have to have individual
01:50PM 10 experts, and what are the common experts? What types of
11 experts would be common experts?

12 MS. DOUGHERTY: Your Honor, the common
13 experts are the generic experts that we contemplate will
14 have to do primarily with liability and also sort of a
15 generic causation expert that in fact the contaminated
16 lots could cause fungal meningitis, and then the case
17 specific discovery that is later contemplated where the
18 expert discovery is set forth would be that in fact in
19 this case, Mrs. Smith, it caused her fungal meningitis.

01:50PM 20 THE COURT: Right.

21 MS. DOUGHERTY: So the idea will be in terms
22 of clinics if we have to move forward against clinics,
23 we're going to have to produce generic expert reports
24 that would say, for example, this clinic, Joe's clinic
25 in Michigan was negligent for the variety of reasons

1 that they didn't properly store the product, they didn't
2 properly evaluate New England Compounding Center, they
3 didn't do the due diligence that they should have done,
4 that's sort of a generic one that would apply to all the
5 plaintiffs that are subject to that clinic, and then the
6 case specific stuff that will come later has to do more
7 with causation and causation of the injury in that
8 particular case.

9 THE COURT: All right. Finally, just to
01:51PM 10 make sure I understand, by bellwether case, I assume you
11 mean cases that for one reason or another are deemed to
12 be representative or otherwise appropriate to go first
13 so as to more or less set precedent, if we get that far,
14 as to what the cases are going to look like and maybe
15 what the settlement value is perhaps; is that the idea?

16 MS. DOUGHERTY: That's exactly right, your
17 Honor. And primarily when it starts off, you know, you
18 have plaintiffs are going to pick three, and the
19 defendants will pick three, and from there we narrowed
01:52PM 20 to the two that could potentially be tried together if
21 your Honor is inclined or one after the other.

22 MS. PARKER: There are two features, your
23 Honor, about the schedule that I would like to bring to
24 the Court's attention. They are not disputed, so I'm
25 not addressing them for that reason, but I think it may

1 be helpful to the Court to explain why we are doing
2 certain things, so you'll see that we contemplate that
3 defendants will file answers to complaints in states
4 with one-year statute of limitations by September 25th
5 of 2013. We then have a separate answer date later on
6 in time for plaintiffs from other states that don't have
7 a one-year statute of limitations, and the purpose for
8 that bumps up against something that we addressed with
9 your Honor in the context of the mediation order.

01:52PM

10 THE COURT: I thought there were only three
11 states, but, anyway, there's five, but go ahead.

12 MS. PARKER: I may have to defer to someone
13 else in the PSC as to how we got the five.

14 MS. DOUGHERTY: Your Honor, there are three
15 states that we believe have folks who have been
16 infected; however, we were just being cautious by
17 putting in all of the states that could apply, for
18 example, Ohio doesn't have a statute of limitation of
19 one year, but it has a statute, a product liability
20 statute that triggers something around one year, so we
21 were just being overly cautious there.

01:53PM

22 THE COURT: Okay.

23 MS. DOUGHERTY: For example, Kentucky, while
24 there might not be a clinic there, some folks went to
25 clinics in other states, so they're from Kentucky, and

1 we were just being overinclusive there.

2 MS. PARKER: So the information that we are
3 primarily concerned with receiving for those one-year
4 states is an issue that you dealt with in the mediation
5 context, which is the identification of entities that
6 may have comparative fault because the one-year statute
7 of limitations may prevent claims from being asserted
8 against those individuals, so we would like to know them
9 now without waiving the right to pursue civil actions
10 against them, if appropriate.

01:54PM

11 The second feature I would draw your
12 attention to, your Honor, is footnote 2, and this is
13 mostly by way of informing the Court about something
14 that has happened in a few instances. In a few
15 instances, I believe only in Tennessee, but I may be
16 mistaken about that, defendants have filed substantive
17 motions, potentially dispositive motions, in the
18 district court or the state court in which an action was
19 initially filed before the action has been swept up and
20 transferred to this MDL either as a result of your
21 Honor's decision on transfer relating to the bankruptcy
22 or by the JPML panel.

01:54PM

23 So, footnote 2 is our effort to address
24 that. We suggest that the Court, to the extent they are
25 traditional Rule 12 or Rule 56 motions, suspend the

1 timing to respond to those motions and track it with the
2 timing set forth in this order and for other motions,
3 and that's a broad bucket, I realize, that the parties
4 inform the Court about those motions that they have been
5 filed and that they've made their way to this Court so
6 the schedule can be addressed, if appropriate.

7 THE COURT: On that, I think the schedule
8 may be more languid than I might prefer. I mean, one of
9 my concerns all the way along is somebody is improperly
10 or for one reason or another named in a lawsuit, and now
11 they're, you know, like a cork bobbing down the stream
12 here, and they're caught up with everything else, and
13 Rule 12 and Rule 56 gives them a vehicle for saying we
14 should be dismissed, and I'm somewhat reluctant to -- I
15 remain a little concerned about having not dealt with
16 those issues already and have some concerns about
17 letting it go all the way to next summer at the earliest
18 before I resolve any of those issues.

19 One problem is I don't know the universe of
20 those motions, frankly I haven't even seen them, so I
21 don't even know what they cover, but in the ordinary
22 course, people file, as you know, Rule 12 motions or
23 early Rule 56 motions for a variety of reasons, and some
24 of them, for all I know, is meritorious, but I'll put
25 that on hold for the moment.

1 MR. CHALOS: Your Honor, may I be heard on
2 this?

3 THE COURT: Yes.

4 MR. CHALOS: I'm just going to stand here.

5 THE COURT: Yes. Could you identify
6 yourself for everyone on the phone.

7 MR. CHALOS: Mark Chalos on behalf of the
8 plaintiffs' steering committee. We were sort of talking
9 about that in the abstract, and maybe I can give you
01:56PM 10 some information that may, you know, put some more
11 context around that. They're in at least one case in
12 the Federal District Court and in one case in the state
13 court in Nashville, Tennessee, the defendant clinics
14 have filed summary judgment motions on issues that are
15 if not global, certainly recurring among the various
16 Tennessee cases.

17 They would not be, I think -- I can't think
18 of any of the grounds that they've asserted that would
19 be dispositive vis-a-vis any defendant, in other words,
01:57PM 20 it would not end the case against those defendants.
21 They involve the interplay of some Tennessee statutes.
22 They involve a recurring fact pattern that we're seeing
23 in a number of these cases. They wouldn't end the case.
24 Our concern is these are issues that are going to touch
25 a number of cases, some of which haven't even yet been

1 filed.

2 THE COURT: That may be true, okay. At the
3 other extreme, there may be some -- I literally don't
4 know what these motions are. There might be some
5 defendant out there who said, you know, we were never
6 properly served, you don't have personal jurisdiction
7 over me, you named the wrong entity, you know, the kinds
8 of things that normally come up in Rule 12 motions. I
9 don't know if there's anything like that. Right now
10 they're all being thrown into the same bucket.

01:57PM

11 MR. CHALOS: Right.

12 THE COURT: And I express no opinion,
13 obviously. I don't want to get into the details now
14 about the issues you raised out of Tennessee. You may
15 be right, you may not be, I don't know, but the Rules of
16 Civil Procedure provide for, you know, parties who, for
17 whatever reason or another, have been wrongly named or
18 wrongfully served to get out early, and I want to make
19 sure that that right is not being entirely abrogated
20 here.

01:58PM

21 MR. CHALOS: Sure. There's one case that
22 was brought to my attention, it's not my case. It's the
23 Carman v. Ameridose case. It's subject to conditional
24 transfer order 17, so it will be here if it's not
25 already here, it will be here. It's C-a-r-m-a-n. That

1 case, there was a motion for summary judgment filed by
2 the clinic defendants a week or two or maybe more. It
3 was filed in the period between the case being initially
4 filed in the Middle District of Tennessee. It may have
5 even been filed after the confidential transfer order
6 was issued, but I believe it was filed after notice went
7 to the JPML of that case being a tag-along. I'm not
8 sure the strategic reason why the clinic filed it then,
9 but they did.

01:59PM

10 We're coming up relatively soon under the
11 federal rules the deadline for the plaintiffs to
12 respond, and they've asked us as a PSC for guidance
13 about what they ought to do. Again, these are global
14 issues that are recurring, and I don't believe it would
15 end the case against anybody.

16 THE COURT: I don't have a problem with
17 staying certain responsive deadlines while we're still
18 in the process of sorting it out. If I understand the
19 proposal, this said that, you know, we're just going to
20 put everything off until next summer and wrap it up with
21 the more global and significant summary judgment
22 motions, and my guess is some of those ought to be
23 disposed that way and others perhaps not, I don't know.

01:59PM

24 MR. CHALOS: Mr. Ellis just reminded me in
25 the current schedule, the motions to dismiss would be

1 heard in December or filed by December of this year. I
2 understand that doesn't alleviate your Honor's concern
3 in its entirety.

4 With respect to the Carman case, now I
5 expect that they'll be other motions for summary
6 judgment filed. For whatever reason, these clinics have
7 decided they're going to take the strategy of filing in
8 that short interim where the case is sitting in the
9 Middle District of Tennessee. The one year statute is
10 coming. There's a bunch of filings happening over the
11 next week or two.

12 I expect they're going to use that strategy
13 in other cases, so at the very least, we'd ask your
14 Honor for an order putting those motions, the response
15 dates for those motions, for those plaintiffs off until
16 we can get some unified schedule that makes sense for
17 everybody.

18 THE COURT: All right. Again, it may --
19 you're calling it a strategy. It may be something that
20 they have a right to do, I have no idea, but I would
21 like this to be orderly. I want it to proceed with all
22 deliberate speed, but I don't want cases that ought to
23 be disposed of, or parties, more accurately probably,
24 that ought to be disposed of early to get caught up with
25 everything and to remain in litigation for years.

1 MS. PARKER: If I may, your Honor?

2 THE COURT: Yes.

3 MS. PARKER: Perhaps -- well, my suggestion
4 would be that the plaintiffs' steering committee
5 identify the motions that we are aware of that have been
6 filed to fit into this bucket and that we propose to you
7 a solution before the next status conference for how we
8 can address those and your Honor's concerns about
9 letting defendants who are not properly named in the
10 case out of the case at an early time.

02:01PM

11 THE COURT: You're not necessarily going to
12 reach agreement on the substantive merits, but I think
13 that's a good plan for at least setting up a timetable,
14 and that would include conferring with the relevant
15 parties. I mean, for all I know, you know, some state
16 has a statute that grants immunity to a pain clinic. I
17 don't know what any of these underlying issues are.

18 MS. PARKER: Yes, your Honor. We will do
19 that. We would ask though that perhaps the minute entry
20 for the status conference could indicate that the
21 deadline will be rolled over until the next status
22 conference, at least, so that we can address that.

02:02PM

23 THE COURT: All right. I would expect to do
24 that.

25 MS. PARKER: Thank you, your Honor.

1 MR. CHALOS: Thank you, your Honor.

2 THE COURT: Who wants to take the lead in
3 responding to this proposal?

4 MR. RABINOVITZ: Your Honor, I will,
5 Dan Rabinovitz representing Medical Sales Management,
6 Inc.

7 THE COURT: All right. Mr. Rabinovitz.

8 MR. RABINOVITZ: In essence, your Honor,
9 just like the Court, the affiliated defendants and I
02:02PM 10 believe also the trustee were only able to read what was
11 filed about an hour before the hearing today quickly, as
12 you put it. We had spent some time in a meet and confer
13 call and then a second call between me and one member of
14 the plaintiffs' steering committee, and we had
15 indicated, when I say we, I mean the affiliated
16 defendants, had indicated that there was a particular
17 form of that schedule that we would not object to.

18 When that call ended, we believed or I
19 believed that we had an agreement and everything would
02:02PM 20 be fine, and then a different document was filed this
21 afternoon about an hour before court. What I propose is
22 rather than necessarily getting into the back and forth
23 of who filed what when in front of this Court, which I
24 think probably should be avoided, if possible, if you'd
25 give us till tomorrow morning to file our version of it,

1 we'd appreciate you considering that version instead.
2 It's drafted, I just need to get it electronically
3 filed.

4 In essence, both footnotes were not in.
5 There are two footnotes in their schedule. Neither
6 footnote was in the version that we had indicated we
7 would not object to, and also while some might call it
8 wordsmithing, the affiliated defendants felt strongly or
9 feel strongly that the way we individually and each
10 different category in each box, we had some very, what
11 we thought was very clear language making the order much
12 tighter and much clearer.

02:03PM

13 We think your Honor would be more
14 comfortable signing an order like that, and so if you'd
15 just give us till, I don't know, roughly 10 in the
16 morning to file our version, that would be great.

17 THE COURT: All right. I certainly have no
18 problem with that. Is that enough time, till 10 in the
19 morning?

02:04PM

20 MR. RABINOVITZ: Absolutely, yeah. I don't
21 know if Mr. Gottfried on behalf of the trustee wants to
22 add anything.

23 MR. GOTTFRIED: Your Honor, just briefly, I
24 absolutely agree with what Mr. Rabinovitz has said.
25 Speaking for the trustee, we participated in the meet

1 and confer on Monday. Prior to the meet and confer, we
2 had a draft from the PSC which did not include these
3 footnotes. After that meet and confer, Mr. Rabinovitz
4 took the laboring work to send a revised document, which
5 we believe was consistent with what we agreed to in the
6 meet and confer. That was sent on Tuesday at about 4:30
7 or so.

8 Subsequent to that, Mr. Moore confirmed that
9 if that was what was filed, he was in agreement with it,
10 and then today at about noon, we got a document that was
11 not that document.

12 So I think Mr. Rabinovitz's suggestion that
13 we file the document that we had provided to them on
14 Tuesday, which we thought was agreed to, for the Court
15 to consider makes sense to the trustee.

16 THE COURT: Why don't we do this. I'll give
17 you till noon, I'll give you an extra couple of hours to
18 scrub for typos or otherwise look carefully at it, and
19 you can either file that document or file whatever
20 response you think is appropriate to this.

21 I don't want to get into the back and forth
22 of who did what when, I just want to hear the relevant
23 positions of the parties, and because we have some
24 deadlines coming up on us, I think I need to dispose of
25 this relatively quickly. That's the only reason I'll

1 even keep it on as tight a schedule as it is.

2 MS. PARKER: To reassure your Honor, I think
3 that both sides of this can agree, we all agreed to the
4 dates, so this is not a question of the dates that are
5 proposed being different as between the parties, if that
6 provides you some solace. I'll also note that this gets
7 back to PSC's issue that we had raised with you before,
8 NECC and Ameridose are either settling, or they're not,
9 right, and if they're settling, then, of course, none of
10 these later decisions apply to NECC or the affiliated
11 entities, so for what's that worth, your Honor.

02:06PM

12 MR. FERN: Judge, if I may.

13 THE COURT: Yes, Mr. Fern.

14 MR. FERN: I think I have to correct
15 Ms. Parker here. NECC is covered by the automatic
16 bankruptcy stay that comes out of Judge Boroff's
17 courtroom, and despite her comments here that they would
18 move to lift the stay and revisit NECC's obligations to
19 answer and do other discovery, we have a statutory stay
20 that covers NECC.

02:06PM

21 Truthful, that does not account for the
22 affiliated defendants, one of which Mr. Rabinovitz
23 speaks for, but even on the first line with the
24 discovery of NECC and affiliated defendants stayed until
25 further order of this Court, unless the Court decides to

1 withdraw the reference, which obviously you have an
2 ability to do, the stay is in effect against NECC.

3 THE COURT: I assumed as much, and I assumed
4 this was a somewhat imprecise way of describing that
5 process.

6 MR. FERN: I just wanted to bring it to the
7 Court's attention. I have another suggestion, if the
8 Court is willing to entertain it. On behalf of MSM and
9 Mr. Gottfried, they discussed getting a counter order to
10 you by tomorrow noon. Since the parties -- this came to
11 us on -- we had our first meeting because of the Jewish
12 holidays Monday noontime. We felt we had reached
13 agreement. What got filed was not consistent with what
14 we had agreed to.

15 Perhaps if the Court would give us an
16 opportunity to go back and meet and confer tomorrow or
17 Monday, perhaps we can get an order to the Court that
18 would not require the Court to make a decision between
19 the PSC's version and/or the defendant's version, and we
20 can agree to an order which would be jointly submitted,
21 and the Court would not have to make a decision on that.

22 THE COURT: Is the holiday on Saturday?

23 MR. FERN: The holiday begins sundown Friday
24 through Saturday, correct, Judge.

25 THE COURT: All right. Ms. Parker, what's

02:07PM

02:08PM

1 your response to that?

2 MS. PARKER: We are always willing to meet
3 and confer, your Honor. I think the differences here
4 are so small that filing two competing orders is not
5 going to be difficult for the Court, but truly we are
6 more than happy to sit down again and go through it.

7 THE COURT: All right. I'm not sure I see a
8 whole lot of difference between tomorrow at noon and say
9 Monday. Why don't I extend that deadline to -- why
10 don't we say Monday at close of business five o'clock
11 eastern time. You don't have to agree, but it will give
12 you a window to do that, but I am going to have to turn
13 this around quickly, I think, in light of where we are
14 on the timetable.

15 MR. FERN: I think that deadline, Judge,
16 will keep the pressure on and give us sufficient time to
17 hopefully get this resolved between the sides.

18 THE COURT: All right. I think I've been
19 ignoring people on the phone. Mr. Blumberg from
20 New Jersey, did you want to be heard on this topic?

21 MR. BLUMBERG: Not on this topic, Judge. I
22 have some other issues with respect to some of the
23 requirements for discovery, one being whether the
24 unaffiliated defendants would be entitled to discovery
25 with respect to NECC in light of our present claims

1 against NECC, and I'm not sure how that is actually
2 addressed in the case management order as well as the
3 requirements for affidavits of merit and how those are
4 going to be addressed with respect to the case
5 management order.

6 THE COURT: Let me speak generically. As
7 Mr. Fern points out, NECC is subject to the protection
8 of the bankruptcy court and the automatic stay. Unless
9 I withdraw the reference, it's Judge Boroff's decision
10 at this stage, at least in the first instance.

11 I certainly expect that some discovery in
12 some form will be forthcoming from NECC if we're in
13 litigation mode at some point, but how we get from here
14 to there remains to be seen, and I hope that as we
15 discussed some months ago that whatever discovery is out
16 there has been preserved.

17 Beyond that, I'm not sure I know what to
18 say, but I don't think I have the power, unless I
19 withdraw the reference, to order NECC to do anything in
20 this litigation.

21 MR. BLUMBERG: Understood, and I guess my
22 second issue, Judge, was that in some jurisdictions, and
23 New Jersey being one of them, affidavits of merit are
24 required, and there's really no provision in the case
25 management order when they are to be supplied and if

1 they are to be supplied. I'm sure New Jersey is not the
2 only jurisdiction that's an issue.

3 MS. DOUGHERTY: Your Honor, if I may on that
4 issue, during the meet and confer on Monday, we did
5 discuss this issue related to the merit affidavits, and
6 the plaintiffs' steering committee was left with the
7 understanding that the folks in New Jersey were going to
8 confer and get back to us as to whether they would waive
9 those requirements and instead agree to the schedule
10 that is set forth in the proposed order, which sets
11 forth dates for expert disclosures, so that is the
12 understanding we have.

02:11PM

13 We are waiting to hear back from the folks
14 in New Jersey to see whether or not they will waive that
15 requirement, given the fact that the disclosures are due
16 shortly, you know, after they're going to have a good
17 sense of what's going to be on file.

18 THE COURT: All right. Let's get back on
19 track with the agenda. Anything else on 3 and 5? Let's
20 go to Number 4, multi-plaintiff complaints.

02:12PM

21 MR. GROSSMAN: Your Honor.

22 THE COURT: Yes, I'm sorry, who's this?

23 MR. GROSSMAN: I'm sorry, this is
24 Steve Grossman on behalf of Inspira in New Jersey.

25 THE COURT: Yes.

1 MR. GROSSMAN: I wanted a clarification with
2 respect to the discovery that is being put on hold.
3 From the representations made in court today, it
4 suggests that there's an agreement between the PSC and
5 the unaffiliated defendants not to pursue discovery.

6 My point is as if indeed we opt to not opt
7 into the mediation and the PSC decides to move forward
8 with discovery against my client, we should be entitled
9 to pursue discovery against the unaffiliated defendants
10 as well. I'm not sure that this order is clear on
11 whether or not we have that right to do so, and I
12 believe we do.

13 MS. PARKER: The PSC has no agreement to
14 stay discovery against the unaffiliated defendants.

15 THE COURT: I think the proposal says it
16 will begin forthwith.

17 MS. PARKER: Exactly, that's correct, your
18 Honor.

19 MR. GROSSMAN: Sorry, I should say the
20 affiliated defendants. We should be able to pursue --
21 my mistake. We should be able to pursue discovery
22 against the affiliated defendants.

23 THE COURT: All right. Ms. Parker, do you
24 want to respond to that?

25 MS. PARKER: The PSC has an agreement on

1 behalf of plaintiffs with the affiliated defendants and
2 NECC. We have not undertaken, nor would we, to extend
3 that to apply to anyone else. There are practical
4 reasons, your Honor, why it may make sense to do so, but
5 we have not asked the Court to do that, and we are not
6 aware that anyone else has taken a position on that.

7 MR. FERN: Judge, you also have a stay
8 order, a mediation order in Judge Boroff's courtroom
9 which covers all 19 affiliated defendants while good
02:13PM 10 faith negotiations are taking place with the Trustee
11 Moore, and we heard Mr. Gottfried just report to the
12 Court that good faith negotiations are going on. Truth
13 be told, that order does not concern or did not involve
14 these unaffiliated defendants, but the same rationale
15 should apply while they're negotiating in good faith.

16 THE COURT: I mean, to cut to the chase, my
17 expectation is I think -- my hope is that the landscape
18 is going to look somewhat difference in 30 or 45 or 60
19 days, and I said it before, I'll say it again, if we
02:14PM 20 aren't going to mediate it or settle it, I want to get
21 going on that. I don't want this case to be still
22 pending 10 or 15 or 20 years from now, but I'm still
23 prepared at this stage to take it a step at a time, and
24 it seems to me that at a minimum more or less keeping
25 things on hold for another 30 days makes sense to me.

1 All right. Number 4, multi-plaintiff
2 complaints. Who wants to take that up?

3 MR. MORIARTY: Your Honor, it's
4 Matt Moriarty for Ameridose. There are cases that have
5 been filed. I know the Adair case was filed in Michigan
6 where there are 20 or 30, I've forgotten, as I looked at
7 that so long ago, nonrelated-plaintiffs tied together in
8 one complaint.

9 We had already negotiated CMO Number 6 with
02:15PM 10 the PSC which says that you can't do that. Now, I know
11 their technical point is that the case was filed in
12 Michigan, not directly into the MDL, so CMO-6 should not
13 technically apply, but I think it is a violation of the
14 spirit of the order to try to do indirectly which you
15 cannot do directly, including by members of the PSC who
16 should know better, and it shouldn't be prohibited.

17 There are reasons why we negotiated it into
18 CMO Number 6. It was not a hotly contested negotiation
19 on that point because it is standard in MDLs to have
02:16PM 20 such a clause, so --

21 THE COURT: What are the short --

22 MR. MORIARTY: And we are very sensitive, by
23 the way -- I'm sorry -- to their -- everybody is trying
24 to conserve resources, so I am very sensitive to the
25 plaintiffs' lawyers not wanting to file 30 filing fees,

1 and if there's a work-around that we could do
2 administratively with the clerks of courts, great, but I
3 don't know if such an order that can be accomplished, so
4 we object to these and are looking for some guidance on
5 whether we should move to sever them here or whether
6 there is some way to work this out.

7 THE COURT: In the short term, what is the
8 harm other than the lost revenue to the Court, in other
9 words, I can't imagine that this would be deemed one
10 case for the bellwether case proposal, for example. I
11 mean, if it comes to that, I will certainly sever the
12 claims of individual unrelated plaintiffs.

13 MR. MORIARTY: In the short term --

14 THE COURT: Yes, in the short term.

15 MR. MORIARTY: In the short term, there
16 probably is none, but sometimes if you don't bring these
17 to light, two things happen, you forget about them, and
18 you have to fix them later, or other plaintiffs' lawyers
19 embolden are to do the same thing, and your problem
20 compounds.

21 THE COURT: I don't have enough information
22 before me to know whether or not anything improper
23 occurred. I certainly would entertain a motion to
24 sever, and if you want to get that process rolling or
25 anyone else does and do the meet and confer, I'd be

1 happy to take it up.

2 You know, I'm aware in other contexts in
3 which lawyers in order to avoid filing fees have
4 aggregated cases, and we've severed and dismissed all
5 but the lead plaintiff forcing the lawyer to refile and
6 paying the, whatever it is, \$400. I've lost track of
7 how much it is. Anyway, it's not cheap to file a new
8 case, but I express no opinion on that here. And,
9 again, I'm proceeding on the assumption these are
02:18PM 10 unrelated plaintiffs, not a husband and wife, for
11 example, something of that nature.

12 So for present purposes, I'll just
13 acknowledge the existence of the issue, and I will
14 certainly not discourage anyone from taking it up and
15 attempting to resolve it. Does anyone else want to be
16 heard on that issue?

17 MR. LIPTON: Your Honor, Marc Lipton. Since
18 the Adair complaint is my complaint, I think I should
19 just say that it's my view that there's nothing
02:18PM 20 improper. In fact, it is fully proper under both the
21 CMO and FRCP-20, but when the issue is briefed or
22 motioned up, we'll respond.

23 THE COURT: Okay. If we get to that point,
24 I'll take it up, and whatever the rules are, hopefully
25 is what I'll follow. I try. It's harder than it looks.

1 [Laughter]

2 THE COURT: All right. Number 6, NECC
3 informal production of documents. Ms. Parker.

4 MS. PARKER: NECC's informal production is
5 ongoing. There have been some issues. We will address
6 them with Mr. Fern, and if need be, we will present them
7 to the Court before the next status conference.

8 THE COURT: And tell me what this informal
9 production consists of at this stage. I assume what
02:19PM 10 that means is there's no document request or
11 interrogatory but that NECC in order to expedite things
12 is making documents available; is that the idea?

13 MR. FERN: Judge, if I can.

14 THE COURT: Yes. Mr. Fern.

15 MR. FERN: Based upon a letter request that
16 was issued by the PSC in conjunction with the trustee
17 back in March and April of this year, we negotiated
18 terms and agreed to produce 24 categories of documents
19 that we had obtained as part of our collection process.

02:20PM 20 Since that time, we continued to review and
21 produced approximately on a weekly basis a rolling
22 production, as we represented to the Court before. Up
23 to this date, your Honor, I'm happy to report on behalf
24 of the trustee that we have produced 1,852 documents
25 which encompass 24,137 pages that have been produced

1 either via a CD-rom and using new technology via a file
2 transfer, FTP, that members of the PSC and others who
3 were authorized to get the documents again on a weekly
4 basis.

5 In addition to those documents, the
6 documents which contain HIPAA material consistent with
7 the last amended protective order that we submitted to
8 the Court that have either patient names or patient
9 healthcare information, we produced an additional 2153
10 documents which encompass 9656 pages. Those documents
11 were sent directly to Rust Omni, the repository that the
12 PSC had designated for receipt of HIPAA material.

13 So in all, we've produced almost 4,000
14 documents, almost 35,000 pages, which encompass almost
15 35,000 pages. Ms. Parker's comment that there are some
16 problems is the very first time I'm hearing about them.
17 We will listen, we will attempt to resolve the problems,
18 but I was not aware of any issues.

19 We will continue to make rolling
20 productions. The last one went out earlier this
21 morning, and the last one this morning actually was on
22 an amended request from members of the PSC for some
23 additional documents which were not part of the initial
24 negotiation. We thought that request to be reasonable.
25 The trustee consented to them, and those amended --

1 those additional documents were produced this morning.

2 THE COURT: All right.

3 MR. BLUMBERG: Excuse me, Judge, this is
4 Jay Blumberg from New Jersey.

5 THE COURT: Yes.

6 MR. BLUMBERG: Would the unaffiliated
7 defendants have access to those records?

8 THE COURT: Does this lead into Number 7?

9 MS. PARKER: No.

02:22PM 10 MR. FERN: No, Judge, it doses not lead into
11 Number 7. The initial -- it's not my place to tell
12 Mr. Blumberg yes or no, especially to a fellow person
13 from New Jersey, but the agreement --

14 THE COURT: Careful, don't go too far down
15 that path. My last two law clerks were both from
16 New Jersey, but they have moved on, and so I have
17 non-New Jersey clerks at this point, so a warning to all
18 of you.

19 MR. FERN: I hope they went on to greater
02:23PM 20 things after being tutored by you as your clerk, Judge,
21 but the original agreement with the PSC was that these
22 documents would be produced to members of the PSC and a
23 select few others, including Mr. Rick Ellis here in
24 Massachusetts and others. There was some thought that
25 the PSC could do their job more effectively if the

1 people who had access to those documents were kept to a
2 minimum, and they were not made available to either
3 unaffiliated defendants, they were not even made
4 available to all the members of the PSC, only counsel to
5 the PSC, so we continue to operate under that goal.

6 Again, as the Court mentioned previously,
7 the stay as to NECC is in effect, so this is a
8 voluntarily production in an attempt to allow the PSC to
9 do their job to get to this mediation process hopefully
10 looking for a global resolution.

02:24PM

11 THE COURT: Mr. Blumberg, I express no
12 opinion as to whether this distribution ought to be
13 wider. Again, I don't think I have the authority to
14 order NECC to do anything. I guess I would ask in the
15 first instance if you're not happy with the current
16 state of affairs to pick up the phone and try to
17 negotiate something different, and we'll take it from
18 there.

19 MR. BLUMBERG: Fair enough, Judge.

02:24PM

20 THE COURT: All right. Anything else on
21 Number 6? Number 7, record retrieval and
22 authorizations. Ms. Parker. I'm sorry, Mr. Moriarty.

23 MR. MORIARTY: This has fallen to me. So
24 throughout the winter when it looked like things were
25 going to pick up speed a little bit, Ms. Dougherty and I

1 and a few others were working on medical releases. We
2 got very close. The project then got stalled, and it's
3 recently been resurrected. We think we're probably done
4 with the release itself in order to move on. There are
5 some lingering issues that I don't think need to be
6 discussed today, but I think we're ready to move on.

7 I think what the problem now is is that the
8 way the defendants, and I assume this means affiliated
9 and non-affiliated, is that pursuant to this case
02:26PM 10 management schedule, it contemplates discovery, it
11 contemplates bellwethers.

12 I think inherent in that is that it should
13 contemplate actually getting these releases executed
14 back to defendants or a vendor who can then go out and
15 obtain the records and distribute them as appropriate,
16 whether it's through the Rust Omni site or otherwise, so
17 that they can be analyzed either by the unaffiliated
18 defendants who are engaged in mediation, the affiliated
19 defendants who are negotiating settlements separately,
02:26PM 20 unaffiliated defendants or others who may be litigating
21 and need to participate in the process of the
22 bellwethers.

23 The bottom line is these records need to be
24 obtained even if it's just for the purposes of the
25 bankruptcy court and the setting up of a claims facility

1 so it knows how to divide up this pie when that day
2 ultimately arrives.

3 So, it's my understanding that there's a
4 little bit of hesitance on the PSC to take the release
5 what we've negotiated to the next step and actually get
6 them signed and get a process in place promptly to do
7 this. It's not an unwillingness to do it forever. I
8 think it's a timing issue, so the defendants believe
9 this has to happen now, and I'll let the PSC speak to
10 their own position on it.

02:27PM

11 MS. PARKER: Well, your Honor, this is the
12 first I'm hearing that Ameridose is interested in
13 pursuing the collection of medical records now. We had
14 a fairly extensive meet and confer about how this case
15 ought to move forward. We talked about plaintiff fact
16 sheets, which would include medical records, during our
17 meet and confer on Monday, so the PSC wasn't aware that
18 anyone from Ameridose wanted to do this.

19 We'll certainly talk about it. I will note
20 though that, again, I feel like a broken record, so
21 forgive me, if the affiliated defendants are settling,
22 they have no dog in this fight. They have no reason
23 that they need plaintiffs' medical records. As your
24 Honor knows, medical record collection is a necessary
25 part of this case. It's also an expensive part of this

02:28PM

1 case, and it's something that we think should be done
2 with great thought and care.

3 We have no interest in keeping information
4 from the defendants, but if the affiliated defendants
5 are going to be out of this case in 30 days, two months,
6 I'm not saying they are, but if that comes to pass, then
7 starting this process of collecting medical records and
8 expending great sums of money, doing that becomes hard
9 to understand why the affiliated defendants have an
10 interest in pushing that.

02:28PM

11 THE COURT: Let me cut this short. Putting
12 aside how we got to where we are today, it's hard for me
13 to see a scenario here, and maybe I'm missing something,
14 in which these claims ultimately get resolved. I mean,
15 you say settling. I assume you mean settling is
16 contributing a pot of money. Someone has to decide how
17 that money in the pot is split up among claimants. I
18 don't see how that process can't occur without the
19 collection of medical records and product

02:29PM

20 I.D. information at some level.

21 As I've been saying from the beginning, it
22 is cumbersome, as you know, you know, chasing down
23 healthcare providers for records, collecting them,
24 organizing them, all of that. I'm not sure I see any
25 reason why that process ought to be delayed regardless

1 of who is asking for it, but I think the place to start,
2 and I think this is what I hear you both saying is you
3 need to talk among one another and see if you can agree
4 on some kind of protocol for going forward.

5 I mean, whoever is the person at the end of
6 the day who decides how this pot is to be divided,
7 surely they're going to need enough information to know,
8 for example, was the person actually administered an
9 NECC steroid, what happened to the person, what medical
02:30PM 10 consequences followed, you know, what is the prognosis
11 and all of that, and I don't see how you do that without
12 the relevant records.

13 MS. PARKER: And we completely agree with
14 that, your Honor, and so let me make two points that I
15 hope to be clarifying rather than argumentative. The
16 first is that the plaintiffs' counsel have been
17 collecting medical records for their own clients, and so
18 it is not as though we will necessarily be starting from
19 scratch when this process begins to unfold.

02:30PM 20 The second is that as your Honor recognizes,
21 in conjunction with an allocation in the bankruptcy or
22 perhaps a filing of proof of claim in the bankruptcy,
23 some medical records will likely be or may, certainly
24 may, if not necessarily need to be collected. So the
25 concern from the plaintiffs' steering committee has

1 always been how do we reconcile all of this efficiently
2 in a way while being cost sensitive and cognizant of the
3 best way to move this case forward sufficiently.

4 THE COURT: Which is why I'm issuing no
5 order right now, I'm simply acknowledging the issue. I
6 think you ought to talk and begin working through these
7 issues, and I do have this residual concern that things
8 that are not collected tend to start to disappear, you
9 know, even medical records, so I don't want the delay to
10 be infinite. Anything else on item Number 7?

02:31PM

11 All right. Item Number 8 is pending
12 motions, motion to dismiss. I continue to have these
13 pending. The other day I pulled up from the computer
14 all of my pending bankruptcy matters and was reminded
15 that I have four or five motions to withdraw the
16 reference pending as well. I guess this, too, will
17 remain on hold unless someone has a different view.

18 Is there something else anyone wants to take
19 up in that regard? Yes.

02:32PM

20 MR. CIPORKIN: Your Honor --

21 THE COURT: I'm sorry, your name.

22 MR. CIPORKIN: Ryan Ciporkin. I represent
23 Alaunus Pharmaceutical.

24 THE COURT: Yes.

25 MR. CIPORKIN: I just wanted to make a few

1 points to this Court. First of all, I did want to point
2 out an issue just as it pertains to this jointly
3 proposed agenda, and Item 8(a)(1) in the brackets, it
4 lists three different document numbers.

5 THE COURT: Yes.

6 MR. CIPORKIN: Indicating that there's been
7 three motions to dismiss that have been filed, but I did
8 want to indicate to the Court that Alaunus has filed 33
9 motions to dismiss by my count.

02:33PM 10 THE COURT: It's only off by one order of
11 magnitude.

12 [Laughter]

13 MS. PARKER: I guess I forgot the "e.g."

14 MR. CIPORKIN: As Ms. Parker had indicated
15 to this Court, the majority of those motions were filed
16 with the district courts prior to the transfer and
17 consolidation in this MDL, so I just wanted to make sure
18 that this Court was aware that there's more motions on
19 the docket other than those three that are indicated in
02:33PM 20 item 8(a)(1).

21 THE COURT: Again, just to be clear, if
22 Alaunus were to press the point and say, look, I want
23 these to be resolved, we don't think we're a proper
24 defendant, I want it teed up, and I'll resolve it.
25 Right now everything is kind of on hold while these

1 other things are happening.

2 MR. CIPORKIN: Correct, your Honor, and so
3 that leads me to my second point is that, you know, I do
4 want to stay on. This is an objection formally to
5 footnote 2 for the same reasons that Mr. Rabinovitz and
6 the trustee's counsel have indicated.

7 THE COURT: All right.

8 MR. CIPORKIN: And, furthermore, in light of
9 the PSC's agreement to extend discovery for another 30
02:34PM 10 days, Alaunus is willing to agree to roll over that
11 deadline for another 30 days as well, the deadlines to
12 respond to the motion to dismiss, that is.

13 THE COURT: All right. Let's turn then to
14 the bankruptcy proceedings. I received yesterday or the
15 day before an assented to motion to defer consideration
16 of and stay appeal in all related motions. This is
17 Dr. O'Connell's Pain Care Center appeal. I had been
18 informally staying it. I received a letter from I think
19 Dykema Gossett suggesting that I should do so, and it
02:35PM 20 has been in a state of suspended animation, so to speak,
21 ever since. Who wants to take up this issue?

22 MR. GOTTFRIED: I can take it up.

23 THE COURT: Yes, Mr. Gottfried.

24 MR. GOTTFRIED: I think, as you may know,
25 from the motion to stay, there has been an agreement in

1 principal subject to court approval to resolve the
2 appeal with respect to the notice requirements. Those
3 papers were filed with Judge Boroff on Tuesday.
4 Judge Boroff has set that down for hearing on the 23d
5 along with other motions, and it is certainly the hope
6 of the proponents of that motion, which would be a
7 complete settlement of the appeal, that it will be
8 acceptable to Judge Boroff, and that appeal will be
9 moot.

02:35PM

10 THE COURT: All right. And would you need
11 anything from me other than granting of the assented to
12 motion to defer consideration and stay appeal pending
13 further developments in the bankruptcy court?

14 MR. GOTTFRIED: I would think not, your
15 Honor.

16 THE COURT: Does anyone else want to be
17 heard on that? All right. Does anyone on the phone
18 want to be heard on this? I have Mr. Meisler from
19 Illinois, do you want to be heard on this?

02:36PM

20 MR. MEISLER: Your Honor, I think counsel
21 summed up where we are nicely, and so I don't think
22 there's much further necessary to add.

23 THE COURT: Ms. Humphrey from Michigan?

24 MS. HUMPHREY: Nothing else, your Honor,
25 thank you.

1 THE COURT: All right. Under 9, we have
2 status of bar date motion, which I think we've addressed
3 and August 23d hearing. Is there anything else to talk
4 about on the bankruptcy question?

5 MR. MOLTON: Your Honor, David Molton for
6 the committee.

7 THE COURT: Yes, Mr. Molton.

8 MR. MOLTON: I just wanted to bring you up,
9 Judge Boroff will be having on the 23d the formal bar
02:37PM 10 date hearing. Also noticed for that date is a motion
11 for contempt by the trustee and the committee jointly
12 with respect to parties who did not comply with
13 Judge Boroff's earlier interim bar date order, and what
14 I would like do is just give your Honor an update of
15 where we are with respect to the interim order with
16 respect to compliance by medical care providers and
17 what's left going forward for the contempt hearing.

18 Your Honor, we are pleased to say that we've
19 had 42 clinics fully comply with Judge Boroff's order
02:37PM 20 and another 16 in the process of complying. As my
21 friend, Mr. Sternklar, and Mr. Meisler on the phone from
22 Skadden in Chicago advised, your Honor, an additional 24
23 medical care providers are subject or parties to the
24 stipulation of settlement that resulted in the motion to
25 defer the appeal and the motion to stay in front of your

1 Honor, and upon Judge Boroff's anticipated granting of
2 the settlement and stipulation, they will be complying
3 with the bar date order in the manner set forth in that
4 stipulation of settlement.

5 There's an additional ten medical care
6 providers on the CDC list that haven't complied, seven
7 of which are subject to the contempt motion. Because I
8 don't know the particulars on the three other than to
9 generalize and say that there might have been service
02:38PM 10 issues with respect to them and there's reservice going
11 on.

12 The hearing in front of Judge Boroff on the
13 23rd with respect to the contempt is going to be an
14 evidentiary hearing, and it's both the trustee's and the
15 committee's hope that the remaining clinics who haven't
16 complied or reached agreement with the committee and the
17 trustee do so within the next week or two before the
18 hearing so that we don't have to go forward with the
19 contempt hearing, but barring that, that is set for the
02:39PM 20 23d.

21 THE COURT: All right.

22 MR. MEISLER: Your Honor, this is
23 Ron Meisler here in Illinois.

24 THE COURT: Yes.

25 MR. MEISLER: Your Honor, one point of

1 clarification, that is, while it's true that the motion
2 for contempt is going toward, in case it wasn't clear,
3 that motion for contempt is going forward against those
4 that are not party to the stip. As those that are party
5 to the stip., the parties agreed pursuant to paragraph 9
6 of the stipulation that upon execution of the stip., the
7 contempt motion was deemed withdrawn, but it was clear
8 that it was solely as to each of those participating
9 notice intermediaries, and it's without prejudice to the
10 trustee and/or the official committee's right to seek
11 the same relief or other relief sought in the contempt
12 motions to the extent that the bankruptcy court were to
13 reject the stip., but the trustee and/or the committee
14 would have to renew that contempt motion at some later
15 date.

16 THE COURT: All right. Anything else on
17 that topic, on the bankruptcy proceedings?

18 MS. HUMPHREY: Your Honor, this is
19 Kathy Humphrey in Michigan, and if the Court would feel
20 it appropriate, I think it would be helpful to us to
21 know from Mr. Molton so that by process of elimination,
22 we can figure out who the seven are that he's talking
23 about, which are the three that are not subject to the
24 motion for contempt or could he identify the seven who
25 remain?

1 THE COURT: Mr. Molton.

2 MR. MOLTON: Your Honor, I don't have that
3 specific information in front of me right now, but we
4 could get that information by way of a notice of filing
5 on the MDL docket.

6 THE COURT: All right.

7 MS. HUMPHREY: Thank you.

8 MR. MOLTON: Just for Mr. Meisler and
9 Ms. Humphrey's clarification, and I'm glad Mr. Meisler
02:41PM 10 clarified, the 20 CT stipulation parties are not part of
11 the seven, so I thought I was clear. If I wasn't --

12 THE COURT: I thought you were, but I will
13 never be upset with anyone clarifying anything in this
14 case.

15 All right. Number 10, status of appeals.
16 Is that covered?

17 MS. PARKER: I believe we've covered that,
18 in effect, your Honor. There's one other appeal that
19 Mr. Sexton from Virginia filed relating to the motion to
02:41PM 20 transfer, but nothing has happened in that appeal yet.

21 THE COURT: That's an appeal of my order to
22 the First Circuit, correct?

23 MS. PARKER: Yes, correct, your Honor.

24 THE COURT: All right. Anything else anyone
25 wants to take up while I have you here? Anything from

1 the plaintiffs' side of the house?

2 MS. PARKER: No, your Honor, thank you.

3 THE COURT: Creditors' committee?

4 MR. MOLTON: No, your Honor.

5 THE COURT: Trustee?

6 MR. GOTTFRIED: No, thank you, your Honor.

7 THE COURT: Defendants?

8 MR. RABINOVITZ: No thank you, your Honor.

9 THE COURT: Let me set at least one more

02:42PM 10 status conference. How far up are we, Peter?

11 THE CLERK: We have October 8th at 1:30,
12 November 7th at 1:30, and in December it gets a little
13 tight. Do you want to do a morning, December 17th?

14 THE COURT: Do you have the calendar? We
15 can do a morning.

16 THE CLERK: December 13th at 10, it's a
17 Friday.

18 THE COURT: December 13th at 10, it's a
19 Friday. Mr. Cicolini tells me my schedule is a little
02:42PM 20 rough in December. Will that work?

21 MS. PARKER: That will work for the
22 plaintiffs, your Honor.

23 THE COURT: Obviously I prefer people coming
24 here from out of town to be able to get in and out in
25 one day. Does 10:00 let you do that?

1 MR. COREN: It makes a little tight for
2 people from Philadelphia, your Honor.

3 THE COURT: We'll move things around. How
4 about we do it at 1:30 on that day, on that Friday?
5 That will give you the Friday afternoon travel, which is
6 always pleasant up and down the East Coast.

7 MR. MORIARTY: Well, the alternative, your
8 Honor, if I may bud in, is maybe 11 works better or 12.

9 MR. COREN: 11 works.

02:43PM

10 MR. MORIARTY: If it's available for the
11 Court because when you start getting into Friday --

12 THE COURT: I can try to move things around.
13 Let's make it 11:00. If I start to get hungry if it
14 goes too long, I'll just shut it down.

15 MS. PARKER: I'll bring snacks.

16 THE COURT: All right. Anything else?
17 Thank you, all. Those of you who observe, have a good
18 holiday, and I will see you next month.

19 MS. PARKER: Thank you, your Honor.

02:43PM

20 MR. FERN: Thank you, your Honor.

21 (Whereupon, the hearing was adjourned at
22 2:43 p.m.)
23
24
25

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I do hereby certify that the foregoing
transcript, Pages 1 through 61 inclusive, was recorded
by me stenographically at the time and place aforesaid
in MDL NO. 13-02419-FDS, IN RE: NEW ENGLAND COMPOUNDING
PHARMACY CASES LITIGATION and thereafter by me reduced
to typewriting and is a true and accurate record of the
proceedings.

Dated this September 17, 2013.

s/s Valerie A. O'Hara

VALERIE A. O'HARA

OFFICIAL COURT REPORTER